which he was appointed. *Connor v. Belden,* 8 Daly (N. Y.) 257. A receiver has no right of appeal from an order of Court removing him from office, for that is a matter of discretion with the Court appointing him, and he holds his position by the sufferance of the Court. *Miller v. Lehman,* 87 Ala. 517; *Milwaukee v. R. R. Co.,* 131 U. S. Appendix lxxxi; *Parson v. Gotham,* 177 Ill. 137; *Detroit First Natl. Bk. v. E. T. Barnum Wire, etc., Works,* 60 Mich. 487; *Matter of Colvin,* 3 Md. Ch. 302.

A receiver cannot appeal from a judgment establishing rights of creditors with regard to each other, as the estate is not thereby aggrieved. *Ross v. Wigg,* 100 N. Y. 243; *Chicago Title, etc., Co. v. Caldwell,* 58 Ill. App. 219.

Custodian receivers, having conceded in the trial court (R. 37, 80), right of plaintiff to decree of dissolution, they could not appeal. *U. S. v. Babbitt,* 104 U. S. 767; *Ganss v. Goldenberg,* 39 App. Cas. D. C. 597.

2.

PETITIONERS, PRIOR TO THE ORDER OF COURT SETTING THIS CASE DOWN FOR ARGUMENT, FILED A MOTION REQUESTING THAT THE HEARING BE HAD BEFORE THE CHIEF JUSTICE AND THE FIVE ASSOCIATE JUSTICES (R. 475). THIS MOTION WAS DENIED (R. 476).

The cause was argued and decided by three judges.

When the opinion was filed, petitioners timely filed a motion for rehearing or reargument before the full bench (R. 522), which was denied, including denial of the motion for rehearing or reargument.

A hearing and decision by only three of the six judges against the timely motion for hearing before a full bench

is not a hearing and decision by the Court, but a nulity. Less than a majority of said Court is not a quorum.

The act of February 9, 1893 (27 Stat. 434), establishing the Court of Appeals for the District of Columbia, provided that it should consist of one chief justice and two associate justices, and that in the absence or disqualification of any member thereof, or for any other reason it might be impracticable to obtain a full Court of three justices, a justice or justices of the Supreme Court of the District of Columbia should be designated to fill the vacancy or vacancies temporarily, and that the parties to any cause might stipulate in writing that such cause might be heard by two justices of said Court.

From time to time the membership of the Court of Appeals has been increased by acts of Congress, but no other changes has been made in the organic statute. No one of the later acts has provided that the Court might function by a quorum of less than all the justices.

In this respect it is significant to compare the statutes relating to the Supreme Court of the United States with those relating to the said Court of Appeals. The act of April 10, 1869 (Sec. 673 R. S.) provides that:

> "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

Similarly, the statute (Sec. 243 U. S. Code), relating to the United States Court of Claims, which consists of a chief justice and four associate justices, provides that:

> "The concurrence of three judges shall be necessary to the decision of any case."

Section 301, U. S. Code, which established the Court of Customs and Patent Appeals, provides that:

> "Any three members of said court shall constitute a quorum, and the concurrence of three

> members shall be necessary to any decision thereof. * * *"

From a review of these enactments, it appears that it is the legislative policy of this country with respect to Federal Courts to provide specifically for a quorum in any given court of less than its entire membership, or to provide that a lesser number than all the members may concur in the decision in any given case, but where no such provision is made in the statute, it is submitted that the Court has no power or authority to decide cases or to transact business by less than the full number of its members.

It would follow, therefore, that if Congress desired that the Court of Appeals for the District of Columbia should function by three members in any particular case, or in all cases, a provision to that effect would have been incorporated in the organic statute, or some later enactment. If that Court can function by three members, why may it not function by one member, and thus divide itself into six separate parts, each hearing cases at the same time?

Petitioners contend that a decision by three of the six members of the Court below is not a decision of that Court, and that a hearing before three of such members is a hearing before an illegally constituted Court, by which petitioners' constitutional right of due process of law under the Fifth Amendment to the Constitution was denied.

It is believed that this Court had in mind such a situation when it used the following language in *Pennoyer v. Neff*, 95 U. S. 714, 733, in reference to due process of law:

> "* * * They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforce-

> ment of private rights. To give such proceedings any validity, *there must be a tribunal competent by its constitution*—that is, by the law of its creation—to pass upon the subject-matter of the suit. * * * (Italics ours.)

Where less than a majority of the members of a court hear a cause, a decree "by the court" has been held to be improper. *Ebling v. Schuylkill Haven,* 244 Pa. 505, 91 A. 360. See also *Brown Drug Co. v. U. S.,* 235 Fed. 603; *Calhoun v. Seattle,* 215 Fed. 226.

Where a ruling on appeal is by two of three justices only, it is not binding as an authority. *Gilbert v. State,* 116 Ga. 819, 43 S. E. 47.

We conclude, therefore, that a decision by three of six Judges not only is not binding as an authority, but is not a decision of the Court below and is not of any value as a precedent.

3.

The opinion of the said three judges fails to give proper effect to eight decisions of this Court, and conflicts with two cases of two Circuit Courts of Appeals, and three cases of the United States Court of Appeals for the District of Columbia.

Relfe v. Rundle, 103 U. S. 222, and *Curran v. The State of Arkansas,* 15 Howard, 304 (in view of sec. 397, title 5, 1929 D. C. Code, set forth in appendix hereto, which vests title in a receiver to all property of an insolvent domestic corporation in a statutory dissolution suit), and also the cases of *Bernheimer v. Converse,* 206 U. S. 516, 534, and *Converse v. Hamilton,* 224 U. S. 243, 256, holding that the title of a statutory receiver in a dissolution suit is paramount to the possession and custody of a mere chancery receiver, who is but the officer

of the court appointing him, and that the title of the statutory receiver is recognized in foreign jurisdictions.

International Ins. Co. v. Sherman, 262 U. S. 346, holding a decree void, which sets up a plan to bar and estop certificate holders of an insolvent insurance company, not parties to the suit, that attempted to bar them and cancel their certificates who failed to avail themselves within twenty days to pay a certain amount on each certificate, surrender their certificates for cancellation and receive stock in a reorganized company.

National Surety Co. v. Coreill, 289 U. S. 426, holding that it was improper in a receivership case to pass upon the wisdom of a plan for reorganization and the rights of non-assenting creditors, without definite, detailed and authentic information.

By force of the last two cited cases, the *ex parte* order of the Court, dated April 8, 1932, in the *Pinkett* case, whereby Receivers Clark and Bryan were authorized and directed to enter into modified contracts of insurance for indefinite periods, was in excess of the jurisdiction of the Court, certainly as to non-assenting creditors (of whom petitioner The Shaw-Walker Company was one) and policyholders, who are, of course, creditors also.

The said *ex parte* order of April 8, 1932, conflicts with the principle decided in the case of *Lovell v. St. Louis Mutual Life Ins. Co.,* 111 U. S. 264, holding that on the termination of its business by a life insurance company, and the transfer of its assets to another company, each policyholder may, if he desires, terminate his policy and maintain action to recover from the assets such sum as he may be equitably entitled thereto. The Pinkett Receivers used the assets of non-consenting creditors (of whom The Shaw-Walker Company was one) and other creditors, including non-consenting creditor-policyholders,

as well as approximately one million dollars ($1,000,000), collected by them during the seventeen months of their "insurance business" from about 65,000 of the total number of policyholders who modified their contracts of insurance with said Receivers, in the promotion of the insurance plan of the Receivership, which was itself insolvent, and nearly all of the assets, including the said premiums, were utilized for administrative expenses, counsel fees and other expenses in connection with the Receivers' said insurance business.

The said opinion conflicts with *Carr v. Hamilton,* 129 U. S. 252, holding that by the act of the insolvency of a life insurance company, the company becomes *civiliter mortuus,* its business is brought to an absolute end, and the policyholders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets.

The said opinion of the three Judges of said Court of Appeals conflicts with the cases of *Sterrett v. Second National Bank of Cincinnati,* 246 Fed. 753 (CCA6), and *McConnell v. Hubbard,* 272 Fed. 961 (CCA2), which held that receivers appointed by virtue of statutes providing for dissolution or winding up of corporations are vested with title to all of the property of the corporation, and that the rights of such statutory receivers or quasi-assignees are paramount to chancery receivers who derive their authority from orders of Courts appointing them.

The opinion of the three Judges of the said Court of Appeals conflicts with three decisions of said Court of Appeals, (1) *Johnston v. Davis,* 56 App. Cas. D. C. 15, 16, holding that the rights of creditors become fixed as of the date when an action for dissolution of a domestic corporation is filed. (In the instant case, the petition of your petitioner, The Shaw-Walker Company for dissolution of the said insurance company, was filed May 12,

1933.) Said opinion conflicts with (2) *Richards v. Geiger,* 39 App. Cas. D. C. 278, holding that an order of the Probate Court of the District Court was void which authorized executors to continue the operation of barroom in this District without obtaining a license from the Excise Board, in whom the authority and power were vested by act of Congress to grant or refuse to grant such license. In the instant case, the equity court authorized and directed Receivers Clark and Bryan to operate an insolvent life insurance business in violation of local statutes, without a license from the local insurance department.

Said opinion conflicts with the case of (3) *Rapeer v. Colpoys,* 66 App. Cas. D. C. 216, which held that a decree which transcends limitation on Court's fundamental power in civil or criminal cases is void. The equity court which entertained the *Pinkett* suit, appointing Receivers to operate an insolvent life insurance business, even without a license, violated the statutes of the District of Columbia.

4.

THE TITLE OF A RECEIVER OF AN INSOLVENT DOMESTIC CORPORATION, APPOINTED IN A STATUTORY DISSOLUTION SUIT, BROUGHT BY A JUDGMENT-CREDITOR AGAINST THE CORPORATION, AS SOLE DEFENDANT, TO ALL OF THE PROPERTY OF THE CORPORATION, IS PARAMOUNT TO THE MERE POSSESSION OF THE PROPERTY OF SUCH CORPORATION BY RECEIVERS PREVIOUSLY APPOINTED IN A SIMPLE CONTRACT CREDITOR'S SUIT AGAINST THE CORPORATION.

In support of the above proposition, we cite:

Secs. 416, 409, 397, title 5, 1929 D. C. Code, set forth in appendix hereto.

Relfe v. Rundle, 103 U. S. 222.
Curran v. The State of Arkansas, 15 Howard 304.
People v. N. Y. City Ry. Co., 107, N. Y. Supp. 247.
Wilmer v. Atlantic and Richmond Airline Co., 2 Woods, 426, Fed. Cas. No. 17,776.
Sterrett v. Second Natl. Bk. of Cincinnati, 246 Fed. 753 (CCA6).
McConnell v. Hubbard, 272 Fed. 961 (CCA2).
Converse, Receiver, v. Hamilton, 224 U. S. 243, 256-7.
Bernheimer v. Converse, 206 U. S. 516, 534.

5.

THE RIGHTS OF CREDITORS IN A STATUTORY SUIT FOR THE DISSOLUTION OF A CORPORATION BECOME FIXED AS OF THE DATE OF THE FILING OF THE BILL, AND WHEN DECREE IS PASSED DISSOLVING THE CORPORATION SUCH DECREE SUPERSEDES PENDING EQUITY RECEIVERSHIP CASE BROUGHT PREVIOUSLY BY A SIMPLE CONTRACT CREDITOR.

We refer to the cases cited in No. 4, hereinabove, and also:

People v. N. Y. City Ry. Co., 107 N. Y. Supp. 247.
People v. Commercial Alliance Life Insurance Co., 154 N. Y. 95, and
Johnston v. Davis, 56 App. D. C. 15, 16.

6.

The three Judges of the Court of Appeals had no jurisdiction to hold valid the decree of Justice O'Donoghue, in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Co.* (Equity 53,391), which authorized and directed the Receivers of the insolvent defendant insurance company, doing business in the Dis-

trict of Columbia and in twenty-five states of the United States, to manage, operate and control said insurance company, *in insolvency,* because the same was in violation of statutes of the District of Columbia regulating the conduct of life insurance companies, which provide recovery of penalties and for prosecution in the police court against a company or association carrying on life insurance business when such company is insolvent, or when its capital stock is impaired to the extent of 25 per cent (see secs. 171-174 176-177, 179, 181, set forth in transcript of record on pages (482-4).

See case of *Richards v. Geiger,* 39 App. Cas. D. C. 278, 284, in which the Court held void an order of the Probate Court of this District, which authorized an executor to continue to operate a barroom business without having obtained a license from the Excise Board.

See also *Rapeer v. Colpoys,* 66 App. Cas. D. C. 218, in which the Court held that a decree which transcends a limitation upon the Court's fundamental power is void.

The three Judges of the Court of Appeals, who decided the instant case, exceeded their power in holding valid the exercise of jurisdiction by Justice O'Donoghue, who, by his decrees in the *Pinkett* case, authorized and directed Receivers Clark and Bryan to "modify" life insurance contracts of the defendant corporation, *in insolvency,* and when the receivership itself was insolvent, and as against the rights and interests of non-assenting policyholders, and other creditors of the insolvent defendant corporation.

VII.

CONCLUSION.

We respectfully submit that this case presents important public questions of general law for determination by this Honorable Court, and it is prayed that the writ of certiorari should issue herein.

Respectfully submitted,

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